No. 79-318

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN R. TORQUATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1979. A petition for rehearing was denied on August 1, 1979. The petition for a writ of certiorari was filed on August 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by limiting petitioner's cross-examination of his co-defendant.

2. Whether the trial court erred in declining to permit petitioner to introduce proof showing that his conduct was lawful on occasions different from those described in the indictment.

3. Whether the evidence was sufficient to prove that petitioner's extortionate scheme affected interstate commerce.

4. Whether an evidentiary hearing should have been granted on petitioner's claim of selective prosecution.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on one count of conspiracy to violate the Hobbs Act, and on thirty counts alleging substantive violations of the Act, in violation of 18 U.S.C. 2 and 1951. He was sentenced to five years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. B).[1]

The evidence at trial, which is summarized by the court of appeals (Pet. App. 30a-34a), showed that petitioner, along with co-defendants John George and Harold Stevens, employed extortion to obtain kickbacks from persons who leased heavy equipment to the Pennsylvania Department of Transportation in Cambria County, Pennsylvania. At the relevant time, petitioner was County Chairman of the Democratic Party in Cambria County. Co-defendant George was the Assistant Superintendent of Highways for the Department of Transportation. Co-defendant Stevens was a foreman responsible for

[1]Co-defendant John George was convicted on one conspiracy count and twenty-nine substantive counts; co-defendant Harold Stevens was convicted of conspiracy and two substantive violations.

construction projects. By virtue of his position as the County Chairman of the Democratic Party, petitioner exercised de facto power to decide which firms would receive contracts with the Department of Transportation.

Nine lessors of heavy equipment testified that petitioner required them to pay percentage kickbacks in order to obtain contracts with the Department of Transportation (Pet. App. 31a). Most of the money was collected by co-defendant George at the time of the rental payments (Tr. 234-236, 260-263, 760-762). Other funds were collected by co-defendant Stevens (Tr. 314-316, 355-356). Initially, payments were made by check (Tr. 1106), but later they were made in cash at petitioner's request (Tr. 643). While the payments made by the lessors were sometimes characterized as political contributions, petitioner's secretary testified that the checks from the lessors were cashed at the direction of petitioner and the proceeds were paid to him (Tr. 946-954).

Petitioner offered no evidence in his defense. Co-defendant George testified that he had in fact collected money at the request of petitioner, that he turned the money over to petitioner or his secretary following collection, and that he believed that the money was going to the Democratic Party as a political contribution (Tr. 1115-1117).

ARGUMENT

1. Petitioner contends (Pet. 8-12) that the district court abused its discretion by preventing him from inquiring into co-defendant George's financial condition during George's cross-examination. This claim is without merit.

When petitioner sought to inquire into the general financial condition of his co-defendant during cross-examination, counsel for George objected on grounds of

relevance. The district court correctly sustained that objection (Tr. 1163-1167). Evidence that George kept some of the funds in question may have strengthened the government's case against George, but would not have rebutted the government's uncontradicted proof that petitioner himself received extortion funds. Indeed, petitioner did not contend at trial that such evidence would be exculpatory, acknowledging that the cross-examination was "being offered to impeach credibility, not to prove anything" (Tr. 1167). The trial judge was within his broad discretion in limiting the scope of this proposed cross-examination. See generally *United States* v. *Kenny*, 462 F. 2d 1205, 1225-1226 (3d Cir.), cert. denied, 409 U.S. 914 (1972). While the district court's ruling narrowed the scope of cross-examination to avoid unnecessary expenditure of time on tangential matters, it did not foreclose petitioner's right to cross-examine or to explore the credibility of the witness. See Fed. R. Evid. 611(a), 403.

2. Petitioner further contends (Pet. 13-15) that the trial court erred in refusing to allow him to call several witnesses who were prepared to testify that petitioner had not used extortion to obtain funds from them. This contention is also without merit.

During trial, petitioner's attorney advised the court that he knew of several persons who had contracted with the Department of Transportation during the time period in question and who would testify that they were not required to make extortionate payments (Tr. 1055). The district court, however, correctly concluded that such evidence would be legally irrelevant (Tr. 1179-1180). Evidence that the defendant has acted lawfully in dealing with persons different from those who are the victims of the illegal scheme charged in the indictment does not tend

to rebut the government's showing of guilt. Such evidence is properly rejected on grounds of relevance. See, *e.g.*, *United States* v. *Null*, 415 F. 2d 1178, 1181 (4th Cir. 1969); *United States* v. *Dobbs*, 506 F. 2d 445, 447 (5th Cir. 1975). Because the government proved that petitioner used extortion as charged in the indictment, his lawful behavior on other occasions provided no defense.

3. Petitioner also contends (Pet. 6) that the government failed to establish a sufficient nexus with interstate commerce.

The evidence at trial, however, showed that many of the victims of petitioner's extortionate scheme made substantial and continuing purchases of fuel and tires shipped in interstate commerce (Tr. 491-499, 513-519, 530-538, 546-560, 559-565, 570-576, 590-594, 596-601, 601-604, 612-613, 620-623). The heavy equipment used by some of the victims was purchased through interstate commerce (Tr. 505-510, 519-523, 576-579, 530-632, 663-669, 677-679). The effect of petitioner's extortionate activities was to diminish the resources of his victims and to impair their ability to conduct their substantial leasing businesses. This impairment in itself was sufficient to bring the extortionate scheme within the purview of the Hobbs Act. See *United States* v. *Cerilli*, No. 78-2105 (3d Cir. June 29, 1979), slip op. 14-16; *United States* v. *Daley*, 564 F. 2d 645, 649-650 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978); *United States* v. *Mazzei*, 521 F. 2d 639, 642-643 (3d Cir.), cert. denied, 423 U.S. 1014 (1975).[2]

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[2]Congress used the full scope of its commerce power when it prohibited extortion affecting interstate commerce under the Hobbs Act. See *United States* v. *Culbert*, 435 U.S. 371, 373 (1978); *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).

4. Finally, petitioner contends that he was entitled to an evidentiary hearing on his claim that his prosecution was selective and discriminatory. However, as both of the lower courts concluded after extensive analysis of this contention, petitioner made no prima facie showing that his prosecution involved intentional or purposeful discrimination. See *Oyler* v. *Boles*, 368 U.S. 448, 454-456 (1962). See also *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944); *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 9-11. There is no need for further review of the concurrent findings of the lower courts on this factual question. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1979

DOJ-1979-10